IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19297 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JIGNESHKUMAR @ PINTOO ASHOK DALWADI - Petitioner

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR HR PRAJAPATI for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2
MR LR POOJARI, AGP for Respondent(s) : 3,
MR JITENDRA MALKAN for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 08/12/2005

ORAL JUDGMENT

1. Jigneshkumar @ Pintoo Ashokbhai Dalwadi, petitioner, has filed this petition under Article 226 of the Constitution of India with a prayer that this Court may

issue a writ of habeas corpus or any other appropriate writ, order or direction, for quashing and setting aside the order of detention dated 12th September, 2005, passed by the District Magistrate, Kheda, - respondent No.2 detaining authority under the provisions of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as "PBM Act") as being illegal, invalid, null and void, suffers from total non-application of mind and violative of Articles 14, 21 and 22 of the Constitution of India. The petition was filed on 19th September, 2005.

2. My learned Brother Justice Anant S.Dave has issued Rule on 23rd September, 2005, which was made returnable after 4 weeks, and that is how the matter has been placed for hearing before this Court.

3. Mr.H.R.Prajapati, learned advocate for the petitioner has invited my attention to the order of detention dated 12.9.2005 passed by the District Magistrate, Kheda. He has stated that the order of committal is also passed on the same day and the petitioner was detained in Surat Jail. He has also

invited my attention to the grounds stated by the authority in its order dated 12.9.2005.

3.1 The learned advocate for the petitioner has also stated that the grounds mentioned in para 8 of the impugned order where it has been stated that it will be open for the petitioner to make a representation to the District Magistrate, Kheda- respondent No.2, to the State of Gujarat through Deputy Secretary – respondent No.1 as well as to the Secretary, Consumer Affairs and Public Distribution Department, Union of India – respondent No.4.

3.2 The learned advocate for the petitioner has also invited my attention to the fact that pursuant to the aforesaid order, the petitioner through his learned advocate has made a representation on 14.9.2005 to the Office of District Collector, Nadiad. In the said representation, it was also stated that, “you are requested to take out copies of this representation and to forward the same to other competent authorities for their consideration.”

3.3 The learned advocate for the petitioner stated

that the petition raises number of questions of fact and law, however, for the present purpose, he is confining his argument only on one ground viz., the detaining authority failed to send petitioner's representation to the Central Government as per his request. So petitioner right to make effective representation is violated as given under Article 22(5) of the Constitution of India.

3.4 The learned advocate has further invited my attention to the provisions of PBM Act, particularly Sec.3(3) and Sec.3(4) of the Act which provides procedure in connection with grounds of detention. He has also invited my attention to Sec.8 of the PBM Act which provides grounds of order of detention to be disclosed to person affected by the order.

3.5 In view of the aforesaid statutory provisions and constitutional provisions, particularly, under Article 22(5) of the Constitution, the learned advocate submitted that the representation made by the petitioner to the detaining authority on 14.9.2005. The detaining authority has received the same on 17.9.2005 and the detaining authority has forwarded the same to

the State Government on 19.9.2005. However, he submitted that the detaining authority did not forward the same to the Central Government at all.

3.6 In support of the aforesaid contention, the learned advocate has invited my attention to the affidavit-in-reply filed by H.C.Kadia Deputy Secretary, Food, Civil Supplies & Consumer Affairs Department, State of Gujarat, in which it was stated that, “I further say that the order of detention dated 12.9.2005 is approved by the State Government on 21.9.2005 i.e., within the stipulated period of twelve days as per the provisions of the Act. I say that the detenu is actually detained on 12.9.2005.” ... He further stated that in the present case the order of detention dated 12.9.2005 is passed by the District Magistrate, Kheda (Nadiad) and it is approved by the State Government on 21.9.2005 and the State Government has reported the facts to the Central Government together with the grounds and such other particulars which were sent by a speed post letter dated 21.9.2005. It was stated that the said report is within the prescribed time limit of seven days as per sub-section (4) of Sec.3 of the PBM Act. However, the affidavit

does not state that the representation made by the petitioner which was addressed to detaining authority has been forwarded to the Central Government.

3.7 It may be noted that in this case the Central Government has also filed affidavit of one Shri A.K.Ganguly, Under Secretary, Department of Consumer Affair, Food and Public Distribution, New Delhi. In para 4 the Union Government confirms the facts stated by the State Government. However, in para 5 he has stated as under:

> "As regards contention made in sub-paras (i) and (k) of para 4 of the petition, it is submitted that the representation dated 14.9.2005 stated to be made on behalf of the detenu was not received in the concerned Section in the Department of Consumer Affairs of the Union Government."

3.8 The learned advocate, therefore, submitted that in view of these two affidavits, one filed by State Government and another filed by Central Government, the position is clear that the detaining authority though requested by the petitioner that his representation

may be send to the Central Government but the State Government has not send the same to the Central Government and, therefore, it is violative of the constitutional right guaranteed under Article 22 of the Constitution of India.

3.9 In support of the same, the learned advocate has first relied upon the judgment of the Apex Court in the case of Balchand Chorasia Vs. Union of India and others reported in AIR 1978 SC 297, particularly on page 297 & 298 which reads as under:

> “It was argued that the representation filed by the detenu through his counsel, has not been considered by the government at all. The High Court was of the view that the aforesaid representation was not given by the detenu himself but by Mr.Jethmalani in his capacity as a member of Parliament. The representation has been placed before us and it clearly recites that Mr.Jethmalani acted not as a member of the Parliament but on instructions from his client, namely, the detenu. In the circumstances, therefore, the High Court was in error in construing the representation made by the petitioner as being made not by him but by his

counsel. It is manifest that the counsel had no personal matter and he was only advocating the cause of his client. In matters where the liberty of the subject is concerned and a highly cherished right is involved, the representations made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty which is engrained in Art.21 of the Constitution. As the representation has not been considered at all by the government which it was duty bound to consider, that by itself vitiates the order of detention. We, therefore, allow this appeal and direct the appellant to be released forthwith."

3.10 A similar view has been taken by the Apex Court in the case of Amir Shad Khan and another Vs. L.Hmingliana and others reported in AIR 1991 SC 1983 where the three Judge Bench of the Hon'ble Supreme Court, Hon'ble Justice Ahmadi, J. (as he was then) in para 10 on page 1991 held like this:

" It must be realised that when a person is placed under detention he has certain handicaps and if he makes a request that a representation prepared by

him may be forwarded to the Central Government as well as the State Government for consideration after taking out copies thereof it would be a denial of his right to represent to the Central Government if the Detaining Authority as well as the State Government refuse to accede to his request and omit to forward his representation to the Central Government for consideration. It is difficult to understand why such a technical and right view should be taken by the concerned authorities in matters of personal liberty where a person is kept in preventive detention without trial. Detenus may be literate or illiterate, they may have access to legal advice or otherwise, they may or may not be in a position to prepare more than one copy of the representation and if they make a request to the authorities which have the facilities to take out copies to do so and forward them for consideration to the Central Government would it be just and fair to refuse to do so? In such circumstances refusal to accede to their request would be wholly unreasonable and in total disregard of the right conferred on the detenu by Article 22(5) of the Constitution read with Sec.11

of the Act. We are, therefore, of the opinion that the Detaining Authority as well as the State Government were not justified in taking a hyper-technical stand that they were under no obligation to take out copies of the representations and forward them to the Central Government. We think that this approach on the part of the Detaining Authority and the State Government has robbed the appellants of their constitutional right under Article 22(5) read with S.11 of the Act to have their representation considered by the Central Government. The request of the detenus was not unreasonable. On the contrary the action of the Detaining Authority and the State Government was unreasonable and resulted in a denial of the appellants' constitutional right. The impugned detention orders are, therefore, liable to be quashed."

4. It may be noted that the Division Bench of this Court in the case of State of Gujarat and others Vs. Hemantkumar Dinkarrai Desai and another reported in 1996(2) GLH 277 (Coram: C.K.Thakker, J. (as he was then) & S.D.Pandit, J.), in that case an argument was advanced

that if the detaining authority failed to make representation that argument is not available to the petitioner when representation made by through his advocate and, therefore, the aforesaid judgments of the Apex Court in the case Balchand Chorasia (supra) and Amir Shad Khan (supra) are not helpful to the petitioner in this case. Dealing with the said contention, the Division Bench has negatived the contention relying upon the case of Amir Shad Khan (supra) as well as unreported judgment of this Court in Special Criminal Applications No.765/93 and 766/93 decided on 28.7.1993. The Division Bench after considering the judgment of the Hon'ble Supreme Court and the earlier judgment on page 279 has held like this:

> “We do not find any reason to take a different view than the view taken by the earlier Division Bench of this Court. Admittedly, in this case, the detenu had given his representation to the detaining authority and in the representation he had stated that along with his representation, one more copy is being supplied to the detaining authority so as to enable it to forward the same to the Central Government immediately and without any undue delay. In spite of the specific request made

to the detaining authority, admittedly, the detaining authority had not forwarded the same to the Central Government. Therefore, in the circumstances the learned single Judge is justified in accepting the said Spl. C.A. The order passed by the learned single Judge is quite legal and proper. In the circumstances, this L.P.A. Is dismissed with no order as to costs."

5. Mr.L.R.Poojari, learned AGP appears on behalf of the State and the detaining authority. He has submitted that the arguments of the learned advocate for the petitioner may not be accepted because in this case the representation has been made by advocate and therefore this Court may not take up such hyper technical contention in this behalf. He submitted that when the detenu himself has made representation, the Court may be right in taking the view that if the Government fails to send the representation to the Central Government then the same may be violation of the Constitution of India. But if the representation made by advocate who is aware about the procedure of law and therefore it is not an obligation to the State Government in this behalf.

6. In my considered view, from the facts stated herein, the representation dated 14.9.2005 was made to the detaining authority i.e. District Magistrate, Kheda – respondent No.2 herein. The respondent No.2 received the representation on 17.9.2005 and thereafter the detaining authority forwarded the same to the State Government on 19.9.2005 and did not forward the same to the Central Government at all. Though the State Government had filed an affidavit but the State Government has failed to satisfy this Court as to when they received the representation and when they send the representation to the Central Government in this behalf. In view of the fact that the representation has not been sent to the Central Government, naturally the Central Government will not be able to consider the representation. In fact the Central Government has filed the affidavit and stated that they have not received the representation made by the detenu to the detaining authority. So naturally the Central Government could not consider the representation in this behalf. Therefore, the fact that the State Government failed and neglected to send the representation to the Central Government and thereby non-consideration of representation by the Central Government in both the circumstances, the valuable right of the

detenu i.e., to consider his representation in view of Article 22(5) of the Constitution is violated.

6.1 It may be noted that the view which I have taken earlier is supported by two judgments of the Apex Court as well as two Division Bench judgment of this Court.

6.2 It may be noted that the preventive detention law along with habeas corpus petition has been recently considered by the Apex Court in the case of Union of India Vs. Paul Manickam and another reported in (2003) 8 SCC 342. In para 7 on page 350 the Apex Court has considered like this:

> “... In case of preventive detention of a citizen, Article 22(5) of the Constitution enjoins the obligation of the appropriate Government or the detaining authority to accord the detenu the earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies the right of making an effective representation. It is the constitutional right of the detenu to get all the grounds on which the order has been made. As has

been said by Benjamin Cardozo, “A Constitution states or ought to state not rules for the passing hour but the principles for an expanding future.” The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningful, in tune with contemporary notions of the realities of the society, and the purposes of the Act in the light of concepts of liberty and fundamental freedoms.”

6.2A Thereafter in para 12 on page 352 the Apex Court has observed like this:

“So far as the pivotal question whether there was delay in disposal of the representation is concerned, the same has to be considered in the background of Article 22(5) of the Constitution. A constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a representation against detention, as imperated in Article 22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same

with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenu is based on the subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Article 22(5) invalidates the detention order. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in Thomas Pacham Dale's case:

> “Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the

imprisonment to continue.”

7. As regards procedural safeguards is concerned, the Hon'ble Supreme Court in that case also in paras 8, 9, 12 and 16 has considered procedural safeguards. In view of these judgments, in my view, non sending the representation to the Central Government is violative of Article 22(5) of the Constitution of India and therefore the detention order is quashed and set aside.

8. It may be noted that similar view has been taken by this Court in Special Civil Application No.15403 of 2005 in the matter of Sanjay Dayalji Chandan Vs. State of Gujarat decided by my learned Brother Justice Anant S.Dave dated 21.9.2005. In that case there was delay in sending the representation and on internal page 11 my learned Brother Justice A.S.Dave has observed like this:

> “Therefore, a records speak for itself and there is a clearly delay of about 10 days in forwarding the representation by the detaining authority to the State of Gujarat. Not only that, but, though averred by the detaining authority that the representation was forwarded to various

authorities, the affidavit in reply filed by the Under Secretary of the Department of Consumer Affairs, Food and Public Distribution, Union of India in the affidavit dated 23rd August, 2005, in para-5 stated that the representation dated 19th July, 2005, was not received by the concerned section in the department. Thus, the valuable right of the detenue for expeditious disposal of the representation against the order of detention stands infringed. The delay of 10 clear days in forwarding the representation by the detaining authority is not even explained much less reasonably. Though, averred in Affidavit in reply by the detaining authority, that the representation was sent to various authorities, the affidavit in reply filed by Union of India, respondent no.4 reveals non-receipt of representation, though forwarded by the detaining authority as stated in affidavit in reply, the detenue is entitled to the benefits and the safeguards guaranteed under Article 22(5) of the Constitution of India."

9. In view of the same, the petition is required to be allowed only on the ground of delay, though the

petitioner has made several grounds in the petition, this Court has not considered anything on the merits of the matter.

10. For the foregoing reasons, the petition is allowed. The impugned order dated 12.9.2005 passed by the respondent No.2-authority is quashed and set aside. The detenu-Jigneshkumar @ Pintoo Ashokbhai Dalwadi is ordered to be set at liberty forthwith unless required in any other case. Rule is made absolute. Direct service is permitted.

(K.M. Mehta, J.)

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